

Testimony of
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Oversight Hearing on the Management of Indian Trust Funds
Before the Senate Committee on Indian Affairs
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Chairman Inouye, Vice Chairman Campbell, and Members of the Committee, we are honored to appear before you in response to the Committee's invitation to discuss the origins of the United States' trust responsibility, how it has been interpreted by the courts and Congress over the past two centuries, and its scope and extent both historically and today. As you know, we are partners in the law firm of Sonosky, Chambers, Sachse, Endreson and Perry, 1250 Eye Street, Suite 1000, Washington, D.C. 20005. We appear here today, however, at the Committee's request, not on behalf of any tribal client.

The Committee has called this hearing at an important time. The federal court in the *Cobell* litigation is actively considering a broad range of questions concerning the Interior Department's past conduct with respect to the management of individual Indian trust funds. In addition, in large measure as a response to pressure from the *Cobell* litigation, the Department has proposed to address trust management for the future through a fundamental reorganization of Indian affairs, calling for the creation of a new agency ("BITAM"), and splitting "trust" functions (as defined by the Department) from other Indian operations within the Bureau of Indian Affairs. Tribes nationwide have expressed considerable opposition to the BITAM proposal, and we expect the Committee to be hearing from tribal leaders in this regard at this hearing.

We share the Tribes' concerns about the BITAM proposal. However, our testimony today focuses on one basic fundamental issue – the federal trust responsibility. As our testimony shows, the BITAM proposal as advanced by the Department is based on significant misconceptions about the trust responsibility. We also submit that the lack of detailed information provided by the Department regarding the proposal means that any possibility that the proposal might meet the trust responsibility is, at best, wholly speculative. Given the government's duties under the trust responsibility, we suggest that this is not an acceptable posture for the Government to proceed with its proposal.

More specifically, we discuss the origins and scope of the United States' vital and historic trust responsibility to demonstrate the following concepts:

1. Since a primary purpose of the trust relationship has always been the protection of tribes as distinct political entities, the trust responsibility and tribal self-government are complementary and not, as the Department apparently contends, in conflict with one another;

2. The common law standards of a private fiduciary apply to federal agencies which control trust funds and property of Indian tribes. This has long been the settled law, decades before the *Cobell* litigation.
3. The trust responsibility is not limited to the protection of Indian rights, resources, funds and property but extends to all special services provided to Indians.

Accordingly, we conclude that the Department's proposal is based on a set of mistaken views about the trust responsibility, and that it does not provide this Committee or the Tribes with any measure of information from which to determine whether it could begin to address the requirements of the trust responsibility. We believe that these are very serious concerns, and that the BITAM proposal must be evaluated in a manner that ensures that the trust responsibility, as developed by the courts and Congress, will continue to be vital doctrine for the benefit and protection of tribes and Indian people – not relegated to some new and lesser role.

1. First judicial formulation of the trust responsibility

As the United States Supreme Court has stated, the “undisputed existence of a general trust relationship between the United States and the Indian People,” is well established. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (“*Mitchell II*”). The trust responsibility doctrine was originally expounded by the Supreme Court and spans nearly two centuries of Supreme Court jurisprudence.¹ It has also been repeatedly recognized by Congress, and has been the explicit basis of most modern Congressional statutes concerning Indians.

¹ E.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Fellows v. Blacksmith*, 60 U.S. (19 How) 366 (1857); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 654-55 (1890); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 300-05 (1902); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Nice*, 241 U.S. 591 (1916); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Payne*, 264 U.S. 446 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946); *United States v. Mason*, 412 U.S. 391 (1973); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974); *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980); *Nevada v. United States*, 463 U.S. 110, 142 (1983); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

The Marshall Court first formulated the trust responsibility doctrine nearly 170 years ago in the two Cherokee cases, both of which involved the question of whether Georgia state statutes were applicable to persons residing on lands secured to the Cherokee Nation by federal treaties. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that it lacked original jurisdiction over a suit filed by the Nation to enjoin enforcement of the state statutes because the Nation was not a “foreign state” within the meaning of that term in Article III of the Constitution. In *Cherokee Nation*, Chief Justice John Marshall described the Federal-Indian relationship as “perhaps unlike that of any other two people in existence” and “marked by peculiar and cardinal distinctions which exist nowhere else.” *Id.* at 16. The Court agreed with the Cherokee Nation’s contention that it was a “state” in the sense of being “a distinct political society . . . capable of managing its own affairs and governing itself.” *Id.* But it held that Indian tribes were not “foreign states,” but rather were subject to the protection of the United States and might “more correctly, perhaps, be denominated domestic dependent nations.” *Id.* at 17. Chief Justice Marshall concluded that “[t]heir relation to the United States resembles that of a ward to his guardian.” *Id.* Thus, recognition of tribes’ sovereign status forms a cornerstone of the trust relationship, which in turn obligates the United States to protect Tribe’ rights as sovereigns.

In the second Cherokee case, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court invalidated the Georgia statutes because the treaties with the Cherokees and the Federal Trade and Intercourse Acts² protected tribal communities as “having territorial boundaries, within which their authority [of self-government] is exclusive. . . .” *Id.* at 557. Chief Justice Marshall in *Worcester* meticulously analyzed the treaties with the Cherokee and emphasized that their right “to all the lands within those [territorial] boundaries . . . is not only acknowledged but guaranteed by the United States.” *Id.* at 557. The trusteeship reflected in *Cherokee Nation* appears to have been implied from this guarantee, for there was no express language in any treaties specifically recognizing a trust. The Court also analyzed the Trade and Intercourse Acts - which protected Indian land occupancy - as providing an additional source for the immunity of the Cherokees from state jurisdiction and, implicitly, for the trust relationship itself.

Worcester is significant for an additional reason. In *Cherokee Nation*, Justices Johnson and Baldwin had concurred in the dismissal of the case because, they reasoned, the Cherokee Nation was not a “state at all.” The two concurring Justices analogized the tribe to a conquered domain, which had not territorial rights save at the pleasure of the conqueror. Justice Johnson considered the Nation a sort of tenant-by-sufferance on the lands secured by the treaties, from which it could be dispossessed at will. *Cherokee Nation*, 30 U.S. at 27.

In *Worcester*, Chief Justice Marshall took considerable pains to refute this conception. He did this by a detailed analysis of the treaties themselves, showing that they confirm the right of self-government

² Act of July 22, 1790, 1 Stat. 137, 139; Act of May 19, 1796, §12, 1 Stat. 469, 472; Act of March 3, 1799, § 2, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143, *codified* at 25 U.S.C. § § 177.

in the Nation. The specific holding of the Cherokee cases was that federal power over Indian affairs was exclusive vis-a-vis the states. In modern terms, state power was preempted. Chief Justice Marshall showed this was the intent of the framers of the Constitution by contrasting the constitutional provisions dealing with Indians with comparable ones in the Articles of Confederation it replaced. But the analysis of the Court went beyond the holding, establishing that tribes are sovereign under federal law and formulating the trust relationship as imposing an obligation on the United States to protect the governmental and other rights of the tribes from the broad and exclusive federal power over Indian affairs, as well as from state legislation. It is true, of course, that the Court in *Cherokee Nation* analogized the relationship to a guardianship. But the Court was clearly expounding a concept intended to govern the tribes' relationship with the United States for as long as the United States has, under the Constitution, power in Indian affairs which makes the tribes comparatively vulnerable to the exercise of that power. Thus, the guardian-ward analogy speaks to the breadth of federal power in the federal structure and the constant peril to which that power potentially subjects tribes. In these landmark opinions, the Court set out the principles that govern the United States' governmental relationships with Indian tribes, and avoided the two alternatives before it – recognizing the tribes as foreign nations, or as entities without any legal protection for their rights.

The treaties and federal statutes Chief Justice Marshall relied upon in the Cherokee cases also recognized that tribes possessed a kind of legal title to those lands habitually possessed and occupied by them.³ Consequently, treaties and agreements were necessary to accomplish the extinguishment of that title and the opening of Indian lands to non-Indian settlement. Accordingly, the treaties were a legally required transaction, contract, or bargain. The ensuing trust relationship was a significant part of the consideration for that bargain offered by the United States. By these treaties and agreements, the Indians commonly reserved their governmental authority and part of aboriginal land base which was guaranteed to them by the United States.⁴ By administrative practice and later by statute, the title to this land was held in trust by the United States for the benefit of the Indians. The Indians later came to be recognized as holding full beneficial ownership to the retained lands and the equitable title to them.

The Cherokee cases demonstrate, however, that the trust relationship is not limited to property rights. Those cases did not involve trust funds or property, but governmental authority. They involved the right of the Cherokee Nation – protected by federal laws and treaties – to function as a self-governing entity, free from the jurisdiction of the State of Georgia over the Nation or its members. It is undeniable that the Cherokee Nation in the 1820s and 1830s was “a distinct political society” in fact as well as law. It had a written Constitution, elected legislature, tribal courts, schools, an established military and had developed a written language with a much higher adult literacy rate than any State of the Union at the time.

³ *Johnson v. McIntosh*, 21 U.S. at 568; see also *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-46 (1941).

⁴ *Cf. United States v. Winans*, 198 U.S. 371, 381 (1905) (“treaty was not a grant of rights to the Indians, but a grant of rights from them, - a reservation of those [rights] not granted”).

The trust responsibility articulated in the Cherokee cases protects tribes' inherent sovereign status as a right reserved in the treaties, and is not premised on any concept that tribes are functionally incompetent to manage their affairs.

In this basic way, the modern Indian self-determination policy that has been the basis of bipartisan federal policy since President Nixon's 1970 Message to Congress is solidly bottomed on the trust responsibility historically articulated by the Marshall court. The two are complementary, not incompatible, and it contradicts the basic purpose of the trust relationship to think of the trust responsibility and tribal self-government as in conflict - for the latter is a prime purpose of the former. Congress has also made this abundantly clear in a number of modern statutes, as we discuss below in Parts 4 and 5.

2. Cases discussing the trust responsibility as a basis for Congressional power over Indians.

When the Court next discussed the Federal trust responsibility in the late nineteenth century, it conceived it as of an extra-constitutional source of federal power, apart from the express powers in the Constitution. In *Kagama v. United States*, 118 U.S. 375, 377-78 (1886), the Court considered the constitutionality of the Major Crimes Act, 23 Stat. 362, 385 (1885), 18 U.S.C. § 1153, enacted by Congress in 1885 to apply to all Indian reservations. Prior to that date, federal criminal law did not extend to Indians committing crimes against other Indians in Indian country. Kagama, an Indian arrested and prosecuted under the Major Crimes Act for murdering another Indian on the Hoopa Valley Reservation in California, challenged the constitutionality of the statute. The Supreme Court agreed with his contention that Article I, Section 3, Clause 8—which confers upon Congress the express power “to regulate Commerce with the Indian Tribes” – did not authorize enforcement of a federal criminal code on Indian reservations. But the Court nonetheless sustained the constitutionality of the statute by relying on the government's fiduciary relationship to the Indians. The Court in *Kagama* fixed the “resemblance” perceived by Marshall in *Cherokee Nation* into a mirror image by holding that “these Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection and with it the power.” *Kagama*, 118 U.S. at 383-84.

An important difference between Marshall's decisions and *Kagama* was the reliance of the Court in *Kagama* upon the guardianship as a justification for federal power rather than a source of judicially enforceable duties and a limitation on federal power. *Kagama* does not recognize unlimited power in Congress, but subsequent cases found that Congress has a rather extensive power over Indians. Statutes granting easements and leases over Indians lands without tribal consent were sustained in the decades following *Kagama*, as was the constitutionality of statutes like the Trade and Intercourse Acts which prevented sale of Indian property without approval by the Secretary of the Interior. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641 (1890); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902). The basis for these decisions was the Court's conception of the trust responsibility – that the Indians were “in a condition of pupilage or dependency, and subject to the paramount authority of the United States” as guardian. *Cherokee Nation*, 187 U.S. at 305.

Probably the most extreme case of this period in terms of federal power was *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1902), which declared that Congress had a “plenary” power deriving from the guardianship to manage Indian property. *Id.* at 565. *Lone Wolf* concerned a statute which allotted tribally owned reservation lands to individual Kiowas and Comanches, and authorized the sale of unallotted lands on the reservation to non-Indians. The Indians sued to enjoin enforcement of the allotment statute because it conflicted with terms of their 1867 treaty that expressly prohibited any cession of reservation lands without consent of three-quarters of the tribal members. This consent admittedly had not been obtained. The Supreme Court held that “as with treaties made with foreign nations . . . the legislative power might pass laws in conflict with treaties made with the Indians.” *Lone Wolf*, 187 U.S. at 566. The Court stated that the treaty could not operate “to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and . . . deprive Congress, in a possible emergency . . . of all power to act, if the assent of the Indians could not be obtained.” *Id.* at 564. The Court in *Lone Wolf* declined to review whether Congress had acted consistently with its trust responsibility, and presumed that Congress had acted “in perfect good faith in the dealings with the Indians.” *Id.* at 568; *see also Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902).

Modern cases have, however, rejected the notion that congressional enactments concerning Indians are immune from judicial review. In *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85-86 (1977), the Supreme Court expressly rejected an argument that there could be no judicial review of statutes affecting Indians, and stated instead that the legislation must be “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians,” quoting its earlier decision in *Morton v. Mancari*, 417 U.S. 535, 555 (1974). The teaching of these cases is that the trust responsibility provides the constitutional standard of review for all legislation in the field of Indian affairs. The question is whether the legislation is rationally related to the trust responsibility. By using the trust responsibility as the standard, the Court has made clear that the trust responsibility applies to all legislation in the field of Indian affairs. Thus, whenever Congress acts in the field of Indian affairs, it does so as trustee, and its actions are subject to review under the trust responsibility standard.

Accordingly, the “exclusive” Congressional power recognized in the Cherokee cases and “plenary” power of Congress as elucidated in turn-of-the-century cases like *Kagama* and *Lone Wolf* is neither absolute nor unreviewable. To be valid, enactments must be tied rationally to the trust obligations. Consequently, even Congress’ broad power to manage Indian relations is constrained by the trust responsibility.

Modern cases have also recognized the trust responsibility as a lens through which federal statutes should be interpreted as they impact tribes. Thus, general federal laws which have a direct impact on Indian treaty and other federal rights have been held not to apply to tribes or Indians or abrogate their rights unless Congress specifically states that intention. *E.g.*, *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) (Age Discrimination in Employment Act (“ADEA”) does not apply to the tribal housing authority); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1292 (11th Cir.

2001) (Rehabilitation Act does not abrogate tribal immunity to subject it to actions brought under Act); *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1130-1134 (11th Cir. 1999) (Americans with Disabilities Act does not waive tribal immunity from suit); *EEOC v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246 (8th Cir. 1993) (ADEA does not apply to tribal enterprise because it would affect the “tribe’s specific right of self-government”); *EEOC v. Cherokee Nation*, 871 F.2d 938 (10th Cir. 1989) (holding that ADEA does not apply to Nation when it would interfere with its treaty right to self-government). Similarly, an act of Congress will not be construed to extinguish Indian property rights unless that intent is clearly and plainly expressed. *Dion*, 476 U.S. at 738-40; *Menominee Tribe*, 391 U.S. at 412-13; *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941). In addition, because of the trust responsibility, it is well settled that statutes affecting Indians “are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,” *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (canon of construction “rooted in the unique trust relationship between the United States and the Indians”); *County of Yakima v. Confederated Tribes of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Washington v. Washington Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675-76 (1979).

It is clear that the trust responsibility also imposes legal duties on federal agencies separate and apart from any express provisions of a treaty, statute, executive order or regulation. An important case so holding is *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), where the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, “would not be an exercise of guardianship, but an act of confiscation.” *Lane*, 249 U.S. at 113. The lands in *Lane* were not protected by any treaty, and there was no claim that the Secretary’s proposed disposition of them violated any treaty or statute. Shortly after *Lane*, in *Cramer v. United States*, 261 U.S. 219 (1923), the Court voided a federal land patent that had conveyed – 19 years previously – lands occupied by Indians to a railway. The Indians’ occupancy of the lands was not protected by any treaty, executive order or statute, but the Court placed heavy emphasis on the trust

responsibility and national policy protecting Indian occupancy as a basis for relief.⁵ This responsibility meant that the officials involved had no statutory authority to convey the lands.⁶

Similarly, in *United States v. Creek Nation*, 295 U.S. 103 (1935), the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Court bottomed its decision on the federal trust doctrine:

The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control

⁵ The Court observed:

unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy

261 U.S. at 227 (citations omitted).

To hold that . . . they acquired no possessory rights to which the government would accord protection would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.

The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.

Id. at 229.

⁶ See *Cramer*, 261 U.S. at 232-35. Prior to *Cramer* and *Lane*, in a case involving a claim under a special jurisdictional statute authorizing an action to be brought in the Court of Claims, the Supreme Court held that the United States had acted “clearly in violation of the trust” by opening a reservation to settlement under the general land laws of the United States, and observed:

That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolutions, unlike the legislation sustained in [*Cherokee Nation v. Hitchcock*] . . . were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert . . . an unqualified power of disposal over the [Indian] lands as the absolute property of the government.

United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 510-11 (1913) (citation omitted). An accounting to the ward, in the form of payment of monetary damages, was required. See also *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *Chippewa Indians of Minnesota v. United States*, 301 U.S. 358 (1937).

and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions.

295 U.S. at 109-10 (emphasis added). More recent lower court cases have similarly enforced fiduciary obligations against executive officials apart from any treaty or statutory limitations. *E.g.*, *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857-59 (10th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 970 (1986) (holding Secretary's fiduciary duties in mineral lease administration exceed requirements in Department's regulations); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1100-01 (8th Cir. 1989) (holding BIA and IHS have a trust responsibility to clean up hazardous open dumps on Indian reservation despite lack of specific statutory language in Resource Conservation and Recovery Act).

3. Standards applicable to the United States in administering Indian trust property

In the course of recent discussions on trust management reform, a question has been raised about whether the Court in the *Cobell* litigation is holding the United States to a new, different or higher standard than previously applied to the Government with regard to its administration of Indian trust property and trust funds. This is reflected in the Secretary of the Interior's recent testimony before the House Committee on Resources, which included a section titled "Changing Standard of Trust Management." There, the Secretary stated that:

[T]he Department's longstanding approach to trust management has been to manage the program as a government trustee, not a private trustee. Today, judicial interpretation of our trust responsibilities is moving us toward a private trust model.

Oversight Hearing on Legislative Proposals Related to the Management of Indian Tribal Trust Fund Accounts Before the House Comm. on Resources, 107th Cong., 2nd Sess. (Feb. 7, 2002) (statement of Gale A. Norton, Secretary of the Interior).

The standard being applied by the courts in their recent decisions regarding the obligations of the Government as a trustee, including the decisions in the *Cobell* litigation, is not new or different. To the contrary, the standard being applied by the courts, including in *Cobell*, reflects application of long-standing and well-settled law.

The Supreme Court has made clear that in administering Indian trust money or trust property, the United States is a trustee, subject to the fiduciary duties attendant to a trust relationship. *Mitchell II*, 463 U.S. at 225; *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942). The Government's

trust obligations arise whenever the United States exercises control over, or management of, the trust property or trust money of Indian tribes and individual Indians. As the Supreme Court stated in *Mitchell II*:

“[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.”

463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980)).

The principles applied by the Court in *Mitchell II* find their roots in the court’s earlier decisions – *Lane v. Pueblo of Santa Rosa*, *Cramer v. United States*, and *United States v. Creek Nation*, *supra*. While the court in these earlier decisions, did not specify precisely what “limitations” do “inhere to such a guardianship,” *Creek Nation*, 295 U.S. at 109-10, subsequent cases have consistently defined the standard applicable to the United States, in its capacity as trustee for Indian trust funds and natural resources, by applying the common law standards that govern private trusts and trustees. Sixty years ago, the Supreme Court looked to the common law of trusts when it decided *Seminole Nation v. United States*, 316 U.S. 286, 297 n.12 (1942). The Court there held that the conduct of the United States, as trustee for the Indians should “be judged by the most exacting fiduciary standards. ‘Not honesty alone, but the punctilio of an honor the most sensitive.’” *Id.* at 297 & n.12 (quoting Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)).

The Supreme Court has continued to rely on the common law of trusts to define the United States’ trust obligations to Indians. In *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117 (1938), the Court explained that “[a]s transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe.” In *United States v. Mason*, 412 U.S. 391, 398 (1973), the Court relied on A. Scott, *Trusts* (3d Ed. 1967) for standards governing United States as trustee, stating that the Government’s duty is “to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” In *Mitchell II*, the Court looked to the *Restatement (Second) of Trusts*, §§ 205-212 (1959), to find that all common law elements of a trust relationship are present with regard to Government’s obligations to Indians. 463 U.S. at 226. And following common law trust principles, the Court held that a breach of trust renders the trustee liable in damages. *Id.* at 226 (citing *Restatement (Second) of the Law of Trusts*, §§ 205-212 (1959); G. Bogert, *The Law of Trusts and Trustees*, § 862 (2d Ed. 1965); 3 A. Scott, *The Law of Trusts*, § 205 (3d Ed. 1967)).

For six decades, the lower federal courts have done the same. In *Menominee Tribe of Indians v. United States*, 101 Ct. Cl. 10, 19-20 (1944), the Court of Claims found it to be “settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee,” citing *Seminole*, and testing the Government’s handling of the Indians’ funds “by the standards applicable to a trustee.” *Accord*, *Menominee Tribe of Indians v. United States*, 102 Ct. Cl. 555, 562 (1945) (same). In *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975), the Court of Claims looked to the *Restatement of Trusts* to define the United States’ duties concerning investment of Indian trust funds, and held that as trustee, the Government was obligated: to promptly place trust funds at interest, to maximize trust income by prudent investment, and “to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested.” *Accord Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (finding “[i]t is well established that conduct of the Government as a trustee is measured by the same standards applicable to private trustees” and relying on the *Restatement (Second) of Trusts* to hold that the United States as trustee is, *inter alia*, “under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary,” to account to the beneficiary for any profit arising out of the administration of the trust, and “to use reasonable care and skill to make the trust property productive”).

Many other cases have applied the same common law trust principles to the government’s administration of Indian trust land and natural resources. In *Coast Indian Community v. United States*, 550 F.2d 639, 652, 653 n.43 (Ct. Cl. 1977), the Court held that “[t]he United States, when acting as trustee for the property of its Indian wards, is held to the most exacting fiduciary standards,” and looked to A. Scott, *Trusts* (3d Ed. 1967) to define standards applicable to United States in leasing land for Indians. The courts have also consistently rejected arguments that the government’s conduct in its administration of the trust, can be tested simply by a standard of reasonableness, but have required that the government meet the higher standards applicable to private trustees. In *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 991 (Ct. Cl. 1980), the Court rejected the Government’s argument that no fiduciary obligation exists unless there is an express provision of a treaty, agreement, executive order or statute creating such a trust relationship. In *Duncan v. United States*, 667 F.2d 36, 42-43, 45 (Ct. Cl. 1981), the court rejected an argument that Congress must spell out specifically all trust duties of the Government as trustee, finding that the creation of the trust sufficient to establish trust obligations. The court held that “the standard of duty for the United States as trustee for Indians is not mere ‘reasonableness,’ but the highest of fiduciary standards.” *See also Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857-59 (10th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 970 (1986) (adopting the dissenting opinion at 728 F.2d 1555, 1563 (10th Cir. 1984) (holding Secretary’s duties in mineral lease administration are *not* limited to complying with administrative law and regulations, but are subject to “the more stringent standards demanded of a fiduciary;” thus when Secretary is faced with a decision on mineral lease management for which there is more than one “reasonable” choice, the Secretary is required to select the alternative that best serves the Indians’ interests)); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of the State of Montana*, 792

F.2d 782, 794 (9th Cir. 1986) (“Courts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries”) (citing *Mitchell II; Seminole*) (third citation omitted); *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997) (relying on G.G. and G.T. Bogert, *The Law of Trusts and Trustees*, for standard defining the Government’s duty to provide adequate notice to Indian trust beneficiaries); *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 586 (9th Cir. 1990) (“[t]he same trust principles that govern private fiduciaries determine the scope of FERC’s obligations to the [Indian] Community”) (citation omitted); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1100-01 (8th Cir. 1989) (holding that BIA and IHS have a trust responsibility to clean up hazardous open dumps on Indian reservations despite lack of specific statutory language in Resource Conservation and Recovery Act); *Red Lake Band of Chippewa Indians v. Barlow*, 834 F.2d 1393, 1399 (8th Cir. 1987) (Secretary has duty to actively seek the best use of reservation funds); *White Mountain Apache Tribe of Arizona v. United States*, 20 Cl. Ct. 371, 380 (1990) (BIA “obligation to maximize the trust income by prudent investment”) (citation omitted).

The law has also been long established that, as trustee, the United States has an affirmative obligation to make full and proper accounting of the trust funds and resources in its control, and to keep clear and accurate records. The government’s duty to account is not new. *See Sioux Tribe of Indians v. United States*, 64 F. Supp. 312, 331 (Ct. Cl. 1946) (finding that the United States “is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting”); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1248 (N.D. Cal. 1973) (the Government’s trust duties include the obligation to account; and the duty to render satisfactory accountings “is a continuing duty”); *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 336, 435 (1986) (citing G. Bogert, *Law of Trusts and Trustees*, § 962 (2d rev. ed. 1978) for duty to account); *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 448 (1992) (duty to account).

The trust responsibility in addition imposes a strict duty of loyalty on federal agencies. The “most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. . . . to administer the trust solely in the interest of the beneficiaries.” *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (quoting 2A A. Scott & W. Fratcher, *Trusts*, § 170, at 311 (4th ed. 1987)); *Accord NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); Restatement (Second) of Trusts § 170 (1959); George G. Bogert and George T. Bogert, *Law of Trusts and Trustees*, § 543, at 217-19 (2d rev. ed. 1993). That duty of loyalty has been applied to the United States in its dealings with Indians. In *Navajo Tribe v. United States*, 364 F.2d 320, 322-24 (Ct. Cl. 1966), for example, an oil company had leased tribal land for oil and gas purposes. Upon discovering helium-bearing noncombustible gas which it had no desire to produce, the company assigned the lease to the Federal Bureau of Mines. The Bureau then developed and produced the helium under the terms of the assigned federal lease instead of negotiating a new, more remunerative lease for the Tribe. The Court of Claims held this to violate the trust responsibility, and analogized these facts to the case of a “fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and

seizes it for himself.” *Id.* at 324. This means that federal agencies must administer their own programs and activities in a manner that avoids adverse impacts on Indian rights.

These well-settled common law trusteeship principles have been applied by the Court in *Cobell*, and in other more recent trust litigation.⁷ The court of appeals in *Cobell* defined the standard applicable to the United States with regard to administration of the IIM accounts by relying on the Supreme Court’s decision in *Mitchell II*. The court stated:

“A fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds).”

Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (quoting *Mitchell II*, 463 U.S. at 225). The court further found, as did the Supreme Court in *Mitchell II*, that “[t]his rule operates as a presumption,” and that a trust relationship arises “‘where the Federal Government takes on or has control or supervision over tribal monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund or a trust or fiduciary connection.’” *Id.* (quoting *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987)). The court of appeals also explained – consistent with the analysis applied by other courts – that while relevant statutes and treaties will define the contours of the Government’s trust obligations, “[t]his does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee’s duties absolves the government of its responsibilities.” *Id.* at 1099. Rather, “[t]he general ‘contours’ of the government’s obligations may be defined by statute, but the interstices must be filled in through . . . the general trust law.” *Id.* at 1101. Relying on these principles, the court of appeals then rejected the government’s contention that the government’s obligations with regard to the trust funds of individual Indians was limited only to the express terms of the 1994 Trust Fund Management Reform Act. The court carefully examined the text of the Act, concluding that by it Congress “reaffirmed and clarified preexisting duties” but did not create them. *Id.* at 1100. The Court found that the Act “sought to remedy the government’s long-standing failure to discharge its trust obligations; it did not define and limit the extent of appellants’ obligations” but instead listed some of the means by which those duties may be discharged. *Id.* at 1100-01.

Applying those principles to the evidence before the district court, the court of appeals affirmed the district court’s ruling that the United States had failed to timely implement trust reforms required by the

⁷ *E.g. Navajo Tribe v. United States*, 263 F.3d 1325 (Fed. Cir. 2001); *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) (relying on Scott and Bogert for trust law principles); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377-82 (Fed. Cir. 2001) (applying Restatement of Trusts)

1994 Act. The court further affirmed the district court's conclusion that the United States was also required – by both the terms of the 1994 Trust Fund Management Reform Act and common law trust principles – to provide the IIM beneficiaries with a complete historical accounting of their funds. *Id.* at 1102, 1103. The court of appeals, like the district court, left the precise form that such accounting should take for further proceedings.

Finally, the court of appeals affirmed the district court's order requiring the government to provide periodic reports on its efforts to implement the reforms required by the 1994 Act and its progress in providing the required accountings. The court found such oversight wholly justified given the historic failure of the Government to implement the necessary reforms, and its malfeasance in the continued destruction and loss of information necessary to conduct an historical accounting. The rulings are entirely consistent with the well-established trust principles that have historically been applied to the Government's administration of trust property and funds.

4. The scope of the trust responsibility extends not just to property but to federal services provided to Indians

The Interior Department's current reorganization plan purports to separate "trust" functions – which would be handled by a new agency (BITAM) – from other Indian functions such as provision of services – which would remain in the BIA. The fallacy in this proffered justification for the reorganization is that Indian services *are* part of the federal trust responsibility. Put simply, the Interior Department and other federal agencies administer special services for Indians precisely because there is a trust responsibility to do so. This is shown both by case law and dozens of statutes enacted by Congress.

A number of cases have held the United States has a trust responsibility to provide services to tribes and Indians. A leading case is *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978), holding that the United States has a trust responsibility to ensure that Indians have access to health care in cases where other sources – such as the state – were unwilling or unable to provide such care. The court rejected the Government's argument that the trust responsibility, standing alone, cannot serve as an adequate legal basis for the relief sought by the Indians. As the court stated:

When the Congress legislates for Indians only, something more than a statutory entitlement is involved. Congress is acting upon the premise that a special relationship is involved, and is acting to meet the obligation inherent in that relationship.

Id. at 557. The Court of Appeals in *White* affirmed, adopting the findings and reasoning of the district court.

Similarly, in *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987), the Ninth Circuit held that the Indian Health Service was obligated to provide the necessary health care to an indigent Indian child, and if IHS believed that the state or county had a duty, it was incumbent on IHS to advance that claim against the other government on behalf of the Indian. The court analyzed the issue by considering the requirements of the applicable federal statutes as well as the trust responsibility, stating:

When the interests of Indians are involved, we must explore congressional intent from a special vantage point: “[O]ur government has an overriding duty of fairness when dealing with Indians, one founded upon a relationship of trust for the benefits of these . . . dependent and sometimes exploited people.”

Id. at 791-92 (citation omitted). The court then applied these principles to its analysis of the obligations imposed by the Snyder Act and the Indian Health Care Improvement Act. The court concluded that by these statutes, Congress intended IHS to be the provider of last resort with ultimate responsibility to meet Indian health needs if alternative sources were not available.

We recognize that the application of trusteeship standards in cases involving the provision of federal services is less well defined than in property cases. In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court articulated a limiting factor in holding that the trust responsibility does not prevent a federal agency from reallocating unrestricted funds from providing services to “a subgroup of beneficiaries to . . . the broader class of all Indians nationwide.” *Id.* at 195. At the same time, the Supreme Court and other federal courts have held the trust responsibility mandates a high degree of procedural fairness and protects against the failure of government agencies to provide Indians with services authorized by Congress. For example, in *Morton v. Ruiz*, 415 U.S. 199 (1974), the Supreme Court held that tribal members living near their reservation could not be excluded from receiving BIA general assistance funds under the Snyder Act and other appropriation acts. In this case, the BIA’s internal manual stated that eligibility procedures were to be published in accordance with the Administrative Procedures Act (APA). *Id.* at 233-34. However, the eligibility requirements which limited general assistance benefits to those tribal members living on a reservation were never published. The Court found that [t]he overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions,” *id.* at 236 (citation omitted), concluding that “[t]he denial of benefits to these respondents under such circumstances is inconsistent with ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.’” *Id.* (citations omitted).

Applying these same principles, the courts have held that the trust responsibility includes a special duty to consult with tribes or Indians to ensure their understanding of federal actions that may affect their rights and to ensure federal consideration of their concerns and objections with regard to such actions. *E.g., HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (“in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by

federal administrative agencies”) (quoting *Felix S. Cohen’s Handbook of Federal Indian Law* 225 (1982)); *Loudner v. United States*, 108 F.3d 896, 903 (8th Cir. 1997) (a tribe’s lineal descendants were not time-barred from claiming a share of a 1972 distribution of an Indian Claims Commission judgment because “the distribution scheme adopted by the Secretary was contrary to his *common-law trust obligations* and that the deadline cannot serve to bar plaintiffs’ claims to the fund”) (emphasis added); *Midwest Trawlers Cooperative v. U.S. Dep’t of Commerce*, 139 F. Supp. 2d 1136, 1145-46 (W.D. Wash. 2000) (Consultation grounded in the trust relationship); *Bedoni v. Navajo-Hopi Indian Relocation Comm’n*, 878 F.2d 1119 (9th Cir. 1989) (Navajo-Hopi Relocation Commission has a trust responsibility to provide correct advice to applicants); *see also Meyers v. Board of Education of San Juan School District*, 905 F. Supp. 1544 (D. Utah 1995) (United States has a trust obligation to meet the education needs of Navajo children); *St. Paul InterTribal Housing Board v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983) (Department of Housing and Urban Development (HUD) has trust obligation to provide federal housing funds to off-reservation Indians).

While many of these cases focus on congressional legislation which in one fashion or another implemented the federal trust obligations, the courts’ analysis of the rights, interests and obligations under such statutes is clearly informed by the overall trust relationship between the United States and Indian people. For example, in *St. Paul InterTribal Housing Board v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983), the court – in evaluating the Government’s obligations to fund housing for urban Indians – examined the origin and basis of the trust doctrine. Quoting from the Final Report of the American Indian Policy Review Commission (1977), the court stated that:

The Federal trust responsibility emanates from the unique relationship between the United States and the Indians in which the Federal Government undertook the obligations to insure the survival of Indian tribes. It has its genesis in international law, colonial and U.S. treaties, agreements federal statutes and Federal judicial decisions. It is a “duty of protection” which arose because of the “weakness and helplessness” of Indian tribes “so largely due to the course of dealings of the Federal Government with them and the treaties in which it has been promised. . . . “Its broad purposes, as revealed by a thoughtful reading of the various legal sources, is to protect and enhance the people, the property, and the self-government of Indian tribes.”

564 F. Supp. at 1413-14 (quoting Vol I., American Indian Policy Review Commission, Final Report, at 126) (submitted to Congress May 17, 1977)). Based on that history, the court found that:

The trust relationship between the United States and the Indians is broad and far-reaching, ranging from protection of treaty rights to the provision of social welfare benefits, including housing. The history of the treatment

of Indians by the United States justifies this interpretation of the trust relationship, and the case law and legislative background support it.

Id. at 1413.

While much of our discussion to this point has focused on judicial expressions of the trust responsibility, Congress has likewise repeatedly reaffirmed its adherence to the trust responsibility and has expressly relied upon the trust responsibility as the foundation for a broad range of enactments regarding tribes and Indians. These enactments confirm that the trust responsibility is at the heart of the federal relationship with tribes and Indians – both with respect to the management of trust money and assets and with respect to the other critical services and rights that are provided and protected by the federal government. Indeed, Congress has provided that essentially every service and activity of the BIA for the benefit of Indians and tribes is grounded in the trust responsibility. Accordingly, any effort to take all “trust” functions out of the BIA, and leave within the BIA only functions that are not “trust,” is based on a misconception about the scope of the trust responsibility.

Of course, where Congress has enacted modern statutes regarding the management of trust funds or trust resources, it has also made direct references to the trust responsibility.⁸ But in a like manner, Congressional enactments concerning other aspects of Indian affairs make the same point – that they also are rooted in the trust responsibility.

For example, the federal government’s trust responsibility for Indian education was recently expressed by Congress in the following language, amending the Indian Education Act:

It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children. The Federal Government will continue to work with local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities toward the goal of ensuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary

⁸ *E.g.*, American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701 (“the United States has a trust responsibility to protect, conserve, utilize and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes”); National Indian Forest Resource Management Act, 25 U.S.C. § 3101(2) (“the United States has a trust responsibility toward Indian forest lands”); American Indian Trust Fund Management Reform Act, 25 U.S.C. § 4041(3) (describing the purposes of the Act as “to ensure the implementation of all reforms necessary for the proper discharge of the Secretary’s trust responsibilities to Indian tribes and individual Indians” regarding trust fund management).

educational needs, but also the unique educational and culturally related academic needs of these children.

No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, § 701 (2002); *see also* Tribally Controlled School Grant Act, 25 U.S.C. § 2502(b) (expressing “the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy for education which will deter further perpetuation of Federal bureaucratic domination of programs”); Higher Education Tribal Grant Authorization Act, 25 U.S.C. § 3302(7) (BIA program for postsecondary education grants: “these services are part of the Federal Government’s continuing trust responsibility to provide education services to American Indian and Alaska Natives”). The federal trust responsibility thus clearly extends to Indian education.

Similarly, with respect to the federal provision of health care for Indian people, Congress has recurrently acted pursuant to the trust responsibility. In the Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. § 2401(1) and (2), which provides mechanisms for coordinating federal programs to address the terrible problem of Indian alcohol and drug abuse, Congress found that:

the Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members,

included in this responsibility is the treaty, statutory, and historical obligation to assist Indian tribes in meeting health and social needs of their members.

Id. More broadly, Congress has provided that the trust responsibility is the cornerstone of the Indian Health Care Improvement Act, the most comprehensive measure addressing the unmet health needs of Indian people nationwide, 25 U.S.C. § 1601(a):

Federal health services to maintain and improve the health of Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people.

Id. In the same Act, Congress provided specific goals by which the fulfillment of the trust responsibility was to be measured. This was stated generally in the following terms:

The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to assure the highest possible health status for Indians and

urban Indians and to provide all resources necessary to effect that policy.

Id. § 1602(a).

Beyond that, Congress has required that federal efforts to improve Indian health be measured by the attainment with regard to sixty-one specific health objectives, including coronary heart disease, cirrhosis deaths, drug-related deaths, suicide, deaths from intentional injuries, infant mortality, fetal alcohol syndrome, diabetes and others. *Id.* § 1602(b). This example shows that the trust responsibility is the basis for all federal Indian policy – even those aspects administered outside the BIA, such as the Indian health care provided by the IHS. It also demonstrates that federal policy as defined by the trust responsibility calls for progress in Indian country that is measured by results – as Congress specifically intends that there be not merely some federal presence and resources devoted to the area of Indian health care, but that the federal role lead to actual improvements in the health status of Indian people.

The trust responsibility is also the foundation for Indian housing services. When Congress recently enacted the Native American Housing Assistance and Self-Determination Act to establish a block grant program to fund tribal housing programs, it included these findings:

there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique federal responsibility to Indian people;

the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;

the Congress, through treaties, statutes and the general course of dealings with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition.

Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101(2)-(4).

Congress has likewise recognized that the trust responsibility extends to programs for the protection of Indian families and the preservation of Indian culture and traditions. For example, in the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, Congress found:

that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.

Id. § 1901(2), (3). ICWA, which provides a federal jurisdictional framework for Indian child custody decisions, underscores the trust responsibility to protect the integrity of Indian families, as well as to protect the sovereign authority of tribes to make child custody decisions regarding their children.

Similarly, the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201, *et seq.*, establishes reporting procedures for incidents of child abuse, requires character investigations for personnel working with Indian children, and establishes a vital grant program. 25 U.S.C. §§ 3203, 3207, 3208. In this Act, Congress again specifically relied upon the trust responsibility of the United States to address this problem. 25 U.S.C. § 3201(a)(1)(F) (“the United States has a direct interest, as trustee, in protecting Indian children”).

Congress has also acted pursuant to the trust responsibility to protect significant aspects of Indian culture from harm. Examples include the Native American Languages Act, 25 U.S.C. §§ 2901, *et seq.*, and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001, *et seq.* In each of these statutes, Congress specifically acknowledged the federal responsibility to address these matters, which are essential to cultural continuity of Indian people. 25 U.S.C. § 2901(1) (“the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages”); 25 U.S.C. § 3010 (NAGPRA’s legal framework for the ownership and repatriation of Native American human remains and funerary and cultural objects “reflects the unique relationship between the Federal Government and Indian tribes”).

The trust responsibility also forms the foundation for federal statutes assisting tribes in developing viable and productive reservation economies. As Congress noted in enacting the Indian Gaming Regulatory Act, “a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.” 25 U.S.C. § 2701(4). Similarly, the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. §§ 4301, *et seq.*, established an

Office of Native American Business Development in the Department of Commerce, authorized creation of a program to promote exports and trade by Indian tribes, and required a demonstration project for Indian tourism. 25 U.S.C. §§ 4303, 4304, 4305. As Congress specifically provided in this measure:

Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties, and the enactment of other laws

the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination and economic self-sufficiency among Indian tribes;

the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to—

encourage investment from outside sources that do not originate with the tribes; and

facilitate economic ventures with outside entities that are not tribal entities.

25 U.S.C. § 4301(5), (6), (9); *see also* Indian Tribal Regulatory Reform and Business Development Act of 2000, 25 U.S.C. § 4301 note (Establishing a Regulatory Reform and Business Development on Indian Lands Authority to identify obstacles to economic growth in Indian country; the United States has an “obligation” to “facilitate economic development on Indian lands”).

5. The trust responsibility is the foundation of the modern Self-Determination policy and does not conflict with it

Finally, Congress has recognized that the trust responsibility is the foundation for federal efforts to assist tribes in strengthening tribal governments. For example, in enacting the Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. §§ 3651, *et seq.*, providing for various grants for training and assistance for enhancing tribal justice systems, Congress stated that its intent was “to carry out the responsibility of the United States to Indian tribes and members of Indian tribes by ensuring access to quality technical and legal assistance” and to “strengthen and improve the capacity of tribal court systems that address civil and criminal causes of action under the jurisdiction of Indian tribes.” 25 U.S.C. § 3652 (1), (2). More broadly, Congress has expressly provided that the Self-Determination policy itself is a

manifestation of the trust responsibility. As Congress declared in enacting the landmark Indian Self-Determination Act:

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian Self-Determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a(b); *see also* Tribal Self-Governance Amendments of 2000, 25 U.S.C. § 458 aaa note, § 3(c) (the Congressional policy “to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals” underlies the Self-Governance program).

In short, Congress in a broad range of enactments has recognized that the federal government has a trust responsibility to tribes and Indians, based on treaties, statutes and a longstanding course of dealings, and that the modern policy of Self-Determination seeks to further that trust responsibility by enabling tribes to meet the needs of their people through the exercise of their own sovereign governmental authority. The trust responsibility as specifically addressed by Congress includes health, housing, education, cultural preservation, economic development and the protection of tribal governmental authority. Based on the framework defined by Congress, it can only be concluded that all aspects of the BIA arise from the trust responsibility, and that any effort to suggest that certain BIA programs are somehow not trust programs is fundamentally inconsistent with the controlling understanding recurrently expressed by Congress.

Conclusion

We again thank the Committee for inviting to us to discuss the history, origins and scope of the vital trust responsibility of the United States to Indians, which we firmly believe must continue to be the centerpiece and guide for federal Indian policy. We would be delighted to answer any questions the Committee may have.